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THE DEVELOPMENT AND FORMATION OF INTERNATIONAL LAW *

I. LAW AND ITS PHILOSOPHIC ASPECT

“Law in general,” says Montesquieu, “is human reason so far as it controls all the people of the earth, and the political and civil laws of each nation can only be considered as individual cases in which this human reason is applied.” Reason was held by the Romans to constitute one of the fundamental elements of law. Cicero announced the existence of “a veritable law, true reason (*recta ratio*), in conformity with nature, universal, immutable and eternal, the commands of which constitute a call to duty and the prohibitions of which avert evil.”

It is at present unnecessary to consider what influence the Stoic, Academic and Epicurean doctrines had on Roman jurisprudence, and it would be risky to support as absolutely final any view which might be expressed on the subject. During the last phases of the Republic there had already come to exist in the world's capital a fusion of the different schools of philosophy; and traces of the Platonic teachings constantly appear in the expression of the great orator's lofty thought.

However that may be, with the passing centuries, jurists extolled the importance of human reason and lauded its noble and fruitful effects. Francois de Vitoria was one of the most famous representatives of the science of law in the sixteenth century, and according to him, reason was human intelligence, and at the same time freedom of will. In 1563 Ferdinand Vasquez Menchaca, a Spanish lawyer of equal fame, spread the doctrine that natural law was nothing but true reason (*recta ratio*), an inborn quality of the human race. He who is known as the father of the law of nations, Hugo Grotius, wrote as follows:

* Translated by courtesy of Mr. Clement L. Bouvé, of the Bar of the District of Columbia.

Natural law consists of certain principles of true reason, which teach us that an act is either morally honest or dishonest according to its fitness or necessary unfitness in so far as it applies to a state of nature founded on reason and social relations, and that consequently God, the creator of all nature, requires or prohibits the commission of such an act.

Barbeyrac, the translator and annotator of the work of Grotius, cited, in connection with this subject, the words of Philo of Alexandria :

True reason is a veritable law in itself, a law both incorruptible and eternal, not inscribed by the hand of this or that mortal on documents or inanimate columns, but blazoned upon an immortal intelligence by the hand of immortal nature.

According to the doctrine of Grotius, natural law orders or prohibits the commission of acts obligatory or unlawful of themselves and by virtue of their own essence. But this natural law is of so immutable a nature that God himself is powerless to change it. Regarding law in general based upon the social relations of the human race, the famous historian is of the opinion that it exists apart from a divine will, and that it would be bound to develop even in the absence of God or in the absence of any divine solicitude for human affairs.

Rolin-Jaequemyns most successfully interpreted this last idea which had been the cause of great difference of opinion between commentators; he was of the opinion that it expressed the meaning that the instinct of sociability and the existence of reason in mankind are facts, proof of which is independent of the existence of a supreme being.

II. POSITIVE LAW

This lofty thought is an off-shoot of the philosophy of law, and the philosophy of law does not consist of a collection of useless and contradictory speculations. It is real; it is useful; it constitutes itself a scientific study, the object of which is to discover fundamental principles. Only, side by side with the determination of principles of juridical rules there exists a limitless array of examples and of facts, which ever since the beginning of humanity show that the relations among men, their daily contact and their every action have been controlled by rules which have grown out of custom or resulted

from express decrees; and that the end and aim of these rules has been to safeguard the liberty of all men by guaranteeing system to all, that is to say, harmonious action. Throughout each successive phase of civilization the duty of applying these rules has been confided either to parties actually interested who had recourse to force, or to arbitrators chosen by the parties, or finally, to judges who derived their jurisdiction from a superior authority. That loyalty which is inherent in mankind and which an appreciation of his own interest tends to develop results in the general application of the juridical ruling without the necessity of having recourse to some other means for its enforcement. But when the necessity of such action exists sanction is not lacking. At first it is manifested by maledictions or by denouncement as well as by the imposition of penalties; with the march of civilization sanction finds its expression in the infliction of damages, as well as in that of punishment, such as imprisonment. This power necessarily varies as do the authorities charged with exercising it. Certain sanctions are so ill-defined as to be scarcely perceptible. The weight of public opinion is frequently sufficient to bring about a given result. When civilization reaches a high stage, men fulfill their juridical duties without even considering the question as to whether or not they are obliged to do so. Law does not necessarily mean constraint; it is an error to say that *Recht ist zwang*. Such a conception is the result of imperfect vision. Law even if broken, even if crushed under foot, is none the less law.

The fields of law are varied and distinct. Next to the domains of private law come those of public and international law; and it goes without saying that the progress of all three has not maintained an equal pace. While in the domain of private law, people who have reached a complete state of civilization can point with pride to laws clearly set forth, to tribunals perfectly organized in all things that concern their jurisdiction, and in their utter freedom to expound the law, and to a complete civil and penal system, the same claim may not be made on behalf of public law, already on a firm foundation to be sure, but where the constitutional pact has not always defined with precision the judicial method by which the respect of institutions

shall be assured, and where recourse to warlike methods to be employed even against the subjects of the state, is still authorized under the name of martial law. Nor can the same claim be made on behalf of the international law, in which there still remain, doubtless, gaps to be filled, but in the field of which there has appeared, in modern times, a spirit zealous for reform, and a desire to introduce those improvements which are so necessary, and to complete the scope of juridical authority.

A splendid picture is revealed by the contemplation of the history of law, and of the successive phases of the development of human genius coming down, step by step, through the ages; the study reveals rich vistas of research, and the juridical institutions of nations constitute, among all the attributes of civilization, the highest symbols of modern progress. This is true with regard to both private and public law; it is also true with regard to the law of nations. It must be admitted that the latter has not yet reached the state of development attained by private and public law, but that its development is a vital fact can not be denied; and it may be confidently stated that the question of whether or not international law is real law must be answered in the affirmative, and the theory that the combination of rules which regulate the relations of states are only binding in a moral sense on the members of the family of nations must be discarded.

According to John Austin, James Mill, and John Stuart Mill, jurisprudence included simply positive law, that is to say, law which is established by political superiors. They discerned the existence of two fundamental ideas in the notion of positive law: that of commandment, that of sanction. They took the ground that international law failed to embrace the requisite qualifications, viewed either from the standpoint of the power which enforced it, or from the standpoint of sanction. As we shall have occasion to point out, this idea of the intrinsic nature of law was incomplete, and due to the misconception of its historic formation. But the erroneous view was shared by others besides philosophers. It was long maintained by statesmen as well, and a striking example thereof appears in the statement in

the House of Lords by the Marquis of Salisbury, not twenty-five years ago: "International law," said he, "has not any existence in the sense in which the term *law* is usually understood. It depends generally upon the prejudice of written text-books. It can be enforced by no tribunal, and therefore to apply to it the term *law* is to some extent misleading." The noble lord desired in these terms to demonstrate the futility of the efforts of those who were advocating the establishment of a court of international arbitration. The words were spoken in July, 1887; twelve years later, the First Peace Conference which united at the Hague the representatives of twenty-six states, adopted the Convention for the Pacific Settlement of International Disputes, and announced the wish of the Powers to organize a permanent court of arbitration, accessible at any time.

III. FIRST MANIFESTATIONS OF LAW IN THE ANCIENT CIVILIZATION

"At the commencement of civilization," wrote Marcellin Berthelot, "all knowledge assumes the form of religion and mystery. Every action was attributed to the gods, identified with constellations, with unusual celestial and terrestrial phenomena, and with all the forces of nature. No man would have dared at that time to carry out a political, military, medical or industrial task without having recourse to sacred formula, the purpose of which was to obtain the good will of the mysterious powers which governed the universe." Law in its development was not free from these influences. In its first phases it was connected with magic and religious practices. Magic consists in the belief in the force which produces results against the course of nature; religion proceeds on the theory that man is dependent upon divinities and owes them his worship. Even the religious monotheists admitted that their God had created magical energy and that he permitted mankind to employ it. Only, as Edward Westermarek remarks: "Besides this sort of magic, there is another kind — witchcraft, in the narrow sense of the term — which is ascribed to the assistance of exorcised spirits, regarded not as the willing agents, but as the adversaries of God, and this practice is naturally looked upon as highly offensive to His feelings."

To revert to the subject of law, it appears that in Babylon sanction was furnished by means of sacred emblems and maledictions; the question of religious protection had not yet arisen. Other civilizations did not fail to fall within the sphere of this fatal influence. Amongst all the nations of remote antiquity the practice of magic had full play; incantations and proceedings for the purpose of obliging parties to respect their engagements or to submit to sentences, are to be found in large numbers; they consist above all in pronouncing denunciations against the offender. For the purpose of proving the truth, modern law has concentrated its energies in establishing a system of proof, that is to say, reasonable methods of affirming or denying such or such a state of facts. According to the famous naturalist, Lamarck, judgment in its broadest sense is "the total result of comparisons made by the mind between the various differing ideas." In the primitive societies "ordealies" were preceded by exhortations. "It was constantly supposed," writes Maxime Kovalewsky, "that a force unknown and independent of the human will would come to the rescue of the weakness and spiritual blindness of the judge, and would disclose to him truths for which he would search in vain unaided, except by the limited means which he himself possessed." Let us not forget that the influence of ancient magic practices was felt with more or less force even in modern times. The French author, Huvelin, describes the significance of the oath in the following well-chosen words:

The affirmative oath, the oldest known by which the party sworn agrees to bear witness to the truth of an allegation regarding a past fact, has a religious character. It includes complex rites, and often a sacrifice. It is looked upon as a judgment of God; if he who takes it perjures himself, God may smite him upon the instant. The promissory oath by which a party binds himself with regard to a future act appears at a more recent date, and only has a religious significance for the party himself. In connection with an adjuration to the Gods, and at times, with sacrificial rites, it partakes of a conditional malediction, expressed or unexpressed, pronounced by the party against himself in the case of perjury. This malediction gives to the promissory oath an aspect more magical than religious. Almost all oaths have become promissory in the course of time, such as oaths of fidelity (allegiance), the oath administered by the magistrate, the juror's oath. The oath given by the witness

assumes this character only when witnesses cease to assume the part of conjurors bringing unconditional support to the defender, and become merely persons who promise to tell the truth.

A famous English jurist, Sir Frederick Pollock, has shown how the religious history of the obligation has repeated itself in the history of English law in the Middle Ages. He says:

It is certain that in England up to the fifteenth century obligations were more or less religious. The civil bond was of meagre obligatory force. This was followed by the oath or the *fides facta*, which was very nearly the same thing. The violation of the *fides facta* constituted an ecclesiastical crime, which brought about spiritual censure, excommunication, etc. That was the situation up to the fifteenth century, but the secular tribunals became aware that they were losing their cases; thereupon, a series of very ingenious fiction was introduced.

It is unnecessary to recall the fact that in the Middle Ages the oath was the great moral guarantee of conventions between Christian princes. A religious atmosphere surrounded international pacts; the claims of the Church, which was anxious to confer jurisdiction upon its tribunals, were solemnized by invocations to the divinity contained in the texts themselves, by religious ceremonies and by the taking of oaths. A doctrine was sought to be established whereby every breach of international law was to be considered a litigation in which the ecclesiastical judge might intervene, simply and solely because the question of peace was in issue. In the fifteenth century Martin of Lodi wrote:

The Pope has the power to force princes to respect the terms of a peace which has been concluded; the crime of breach of the peace amongst princes originates in the ecclesiastical courts.

It must be remembered that in the social organization which characterized the first ages of humanity, the application of juridical rules is seldom to be found. There was scarcely any occasion therefor in the internal administration of the clan. In fact, it may be said that the first indications of law taken chronologically are those of inter-tribal law. It was between tribe and tribe that contact was produced, and even here, actions which to-day are considered culpable and criminal appeared just and meritorious. Ravishment or theft assumed

significance only when the victims belonged to another tribe. Let us recall the curious remark made in the sixteenth century by William Lambarde in the *Eizenarcha or of the office of the justice of peace*, the first edition of which appeared in 1581. "Thieves," said he, "we called them until the number of seven men, from seven a troupe until the number of thirty-five, and an army above that number." Thus is the belligerent nature of theft made clear, and the criminal nature of loot!

The first judgments took the form of oracular expressions of the deity. Huvelin correctly points out that these judgments constituted veritable juridical rules for the future, and that the idea that judgments are only relative and binding upon the parties to a cause is of recent origin. Moreover, was not the ancient view that judgments had a general force to be found in the *arrets de réglemant* of the French parliaments prior to the Revolution of 1789? Is it not to be found reasserting itself even in our own days in various countries in the power attributed to the courts to make common law without precedents? Does it not, moreover, constitute the basis of the authority attributed in all lands to a series of uniform judicial decisions?

Law in its religious aspect appears in the Homeric epics; the **θέμιτες** are the judgments which emanate from the gods; as yet "law" does not exist. The word **δίκη** means custom in its embryonic state. It has a significance varying between our understanding of the terms *judgment* and *custom*. It proves the existence of a set of rules more developed than the **θέμιτες** but the word **νόμος** law, which was later to occupy a place of considerable importance in the political vocabulary of the Greeks, does not yet appear at this stage.

At Rome it was religion which was the guarantor of property rights; the latter as well as the "champ" were placed under the protection of domestic gods. Under this system it was necessary that the hearth be surrounded by a boundary consisting, perhaps, of a hedge, of a grove of trees, of a stone wall. This boundary was sacred and it was an act of impiety to cross it. There should likewise be a boundary surrounding what was known as the *champs*, or a small area of soil of several feet in extent, which was to remain unculti-

vated. Large stones or the trunks of trees constitute the *terminii* and the sacred boundaries. Man and beast who touched the *terminii* became "devotees," or subject to being sacrificed by way of expiation. These notions are to be found among numerous other peoples. The idea is not limited to private law; it is to be found in that body of law which we to-day call international law. In relations between nations one of the fundamental conditions of the maintenance of order is respect for frontiers, and here, too, both magic and religious sanction came into play; the gods were sure to punish the violation of frontier rights.

The pontiffs formed a college, which, up to the middle of the fifth century succeeding the foundation of the city, monopolized the interpretation of the law. Paul Frederick Girard wrote:

The science of law was at that time, at least to all practical purposes and to a very great extent, monopolized by the Pontiffs. As the result of the commingling of principles of private law and religion, the influence of the *calendrier* upon justice, and also perhaps as the result of the primitive religious character of the *sacramentum*, they certainly had, in spite of many obscurities, a notable effect upon practice, and it is easy to see that they must have sought to make a sort of secret capital out of this practical knowledge—a monopoly as far as their body was concerned.

They did not represent a caste, but the city and three tribes probably bore an equal part. Moreover, their proper duties consisted in watching over the application of sacred law, in superintending divine worship, and in supervising the performance of propitiatory or expiatory ceremonies.

Like other nations of antiquity, the Romans sought to gain the favor of the gods before entering upon any war. Writes Guido Fusinato:

We see them offering up sacrifices, prayers, and vows, on the eve of going into battle; and, moreover, they attempted invariably to prove to the gods that Rome had suffered an outrage, and they answered the call to arms only because they were absolutely forced to do so. This was the purpose of the functions of the *feciales* on the brink of war. The ceremonials to be performed were prescribed with the greatest precision, as were the number of times which the *feciales* were to proceed to the

enemy's frontiers, the delays to be observed, the formulas to be employed, the color and material of their clothes, and the sacred herb, the symbol of their mission.

When they declared war, it was the duty of the *feciales* to hurl lances into the enemy's territory.

As times passed the Roman arms carried Roman dominion into far-off lands. In view of the great extent of territory subject to the Republic, and, consequently, the remoteness of the enemy's country, it became impossible to carry out these formalities. The difficulty was met by having a soldier of the army of Pyrrhus, who had been captured, buy a block of land in front of the temple of Bellona, and by looking upon this block as enemy territory. The conventional forms adopted by the Romans for declaring war were taken up in the last centuries of the Middle Ages by authors who devoted themselves to developing them and recommending their adoption. The usages of the nations who had invaded occidental Europe, and established themselves there, were merged in this conception, and thus the obligation of the *diffidatio* or defiance, introduced for the purposes of private warfare by the laws of emperors and kings, was, in connection with the former traditions, influential in bringing about the necessity of a solemn declaration of war.

The Romans were not satisfied with invoking the good will and support of their own gods; when war broke out, the pontiffs adjured the tutelary deities of the hostile city to deliver her into their hands, and in order that their prayers might be met they even caused a temple to be founded in Rome dedicated to the foreign gods. The *evocatio* tended to displace the practice of invoking the divine protection of the alien gods. Their good will could not be taken by storm; thus their consent was necessary. In the year 396 B. C., Queen Juno left Veji on the promise that a temple should be raised in her honor at Rome. Some years later the statues of divinities were permitted to be taken into captivity and placed in Assyrian temples; the hostile gods thus became prisoners of the gods of Nineveh.

If the declaration of war had its symbols and its ceremonies, so too

did peace compacts of the Romans. The method of bringing about the *fœdus ferire* had its conventions; the sacred vases, the place and the hour where the act of alliance was to be sealed with pledges, the form of the oath, the victim immolated in accordance with sacrificial rites — all these acts were the subject of strict regulation.

Such, then, is the lesson taught by history — the blending of magic and religious practice in fields actually appertaining to private, public and international law. As yet at this early epoch there were no rigid texts, no uniformity. It is only later that system, classification and organization appear.

It would be easy to multiply examples; each successive phase shows the influence of juridical institutions.

In the fourth century before the Christian era the greater part of Europe was under Celtic dominion. The Celts occupied, or to be exact, their warlike bands overran regions of boundless extent. To cite the words of an historian, they overran the world, sword in hand, and their expeditions covered three continents. In Asia, they founded the Kingdom of the Galatæ, in Europe they ruled supreme from Thrace to the ocean; their domain extended over the north of Italy, over the greater part of Spain, and over the British Isles; in Africa they threatened the existence of Carthage. Their expedition against Rome was victorious, and the Romans were obliged to have recourse to ransom in order to get rid of the invaders. Toward the middle of the third century before Christ, a portion of these vast lands threw off the Gallic dominion, which, however, still continued to exist in occidental Europe and in the British Isles.

In Gaul there existed brotherhoods which were associated with other brotherhoods in the British Isles. They included various kinds of affiliated societies, the Druids, the Bards, the Devins. Membership in these societies was acquired by examination. One of the functions of the Druids was the education of youth, another the administration of justice. Julius Cæsar said that the Druids took cognizance of nearly all public and private questions in dispute. Said he:

If any crime has been committed, any murder, or if any question is brought up with regard to inheritance or boundaries, it is they who de-

cide it; they impose penalties, and grant rewards of merit; if a private individual or magistrate fails to yield to their decision they forbid him the benefit of sacrifice. This penalty is the severest of all which they inflict; those on whom it is imposed are classed as impious and felons; they are shunned; all communication and intercourse with them is as much avoided as if their presence had a baleful influence; they can not apply to a court of justice nor can they attain public distinction.

Cæsar, it seems, took upon himself the management of the national priests. At the time of the conquest human sacrifices took place in Gaul, but he does not appear to have ordered them suppressed. But Augustus took steps which were to have evil consequences for the Gallic cults. He announced that the exercise of the Druid religion was incompatible with the status of a citizen of Rome. Tiberius stood for a still more radical solution of the question. He instituted among the Druids a *senatus consult* which imposed upon magicians the same death penalty which was inflicted upon murderers and poisoners. Nevertheless the Druids did not completely vanish as a sect. Finally the Emperor Claudius ordered their proscription, and as a result a great number of them perished. Those who escaped fled to Britain and Ireland.

When Britain was conquered by the Romans, Druidism was concentrated in the southern portion of the country, and members of the sect were forced to take refuge in the northern part where St. Columba found it in existence, when after having founded the Monastery of Iona, he spread the Christian doctrine among the northern Picts. Druidism continued also to exist in Ireland, where, however, the texts make no mention of human sacrifices. In Ireland, which had escaped the Roman conquests, the Celtic spirit developed rapidly and yielded very slowly and in part only to the influence of Christianity. For more than a hundred and fifty years Druidism existed side by side with the teachings of Christian preachers. According to one tradition Christianity had been taught in Ireland ever since the first century of our era by priests who had come from Asia Minor. According to another version it commenced in the year 432, thanks to the apostolate of St. Patrick in connection with the Church of Ephesus. Moreover, the Irish Church preserved for many years

characteristics which give proof of its Asiatic origin: the excessive number of bishops, country bishops, or bishops for the rural districts, in opposition to the Church of Rome, which only allowed one bishop for each city. Asiatic custom was associated with the celebration of Easter, and the mode of administering baptism. Moreover, it applied to ecclesiastical functions the juridical notions of the clan: on the decease of the person vested with the duties of bishop or abbot, the clan to which he had belonged had the right to nominate his successor, and if at the time there was no person with the qualifications necessary for the position, the clan had the power, on the death of the stranger which it had been obliged to designate in his stead, to insist upon its inherent rights and obtain the corresponding appointment on behalf of one of its members who had finally become qualified to accept the duty of the office. The Irish law had certain characteristics more or less disconcerting to those who believed that law originates only in the forms in which it is seen to develop among nations who have reached a high stage of civilization. There did not exist, it is true, either legislative or judicial power; nevertheless juridical rules governed social relations, and judgments were rendered for the purpose of settling differences; these judgments were preserved and respected.

The Druids had disappeared from Ireland but the "brehons" and the "bards" still remained. The word "brehon" comes from a verb which means to *arbitrate*. In the law as administered by the "brehons" everything pointed toward forcing the adverse parties to submit to arbitration, by means of seizing their cattle and their effects, as a general rule, and by means of an enforced fast, when it came to dealing with persons called *named*, which means sacred — such as kings, nobles, priests, scholars and master-workmen. When the arbitration was completed, and the sentence pronounced, the last step had not been taken; the decision had yet to be enforced. Recourse was again had to forcible seizure; then followed a sanction of a special kind. He who refused to submit to the decision put himself in the place of forever refusing the protection of the "brehons," who went so far as to declare that "neither God nor man owed him any-

thing" and who thus in effect released all his creditors. Resistance was called "flight," and he who resisted was a "fugitive."

The "file" exercised the powers of the *brehons* or the arbitrators. "The *file*," wrote Henry d'Arbois de Jubainville, "are in Ireland jurisconsults, and by virtue thereof judges, legislators and lawyers. * * * They are tellers of tales. They relate in speech or song old war legends, deeds of arms, and tales of pomp and travel, which Ireland considers constitute her national history. * * * They are devins; by means of incantations, or magic formulæ they were able to impose upon a man certain rules of conduct and to make it impossible for him under pain of death to do such or such an action, whether inoffensive or commendable, from a moral standpoint."

It is to be observed that the arbitrator guilty of prevarication was subject to punishment. "When a *file* handed down a wicked sentence," says H. d'Arbois de Jubainville, "lumps ordinarily appeared upon his face, which constituted the visible signs of prevarication. * * * When in the midst of judges assembled Chanchobar Fachtna, the son of Sencha, pronounced an unjust judgment, if it was harvest time all the fruits of the earth where he was fell from the trees in one night; if it was at milking time, the cows refused to nourish their calves."

Some Christian preachers succeeded, but only in small numbers, in exercising an influence similar somewhat to that of the *file*; in any event it was, as a general rule, the *file* who succeeded in holding the confidence of the Irish inhabitants. That lasted for hundreds of years, and even in the seventeenth century, when the English conquest had been effected under circumstances of implacable cruelty, the *brehons* were at that time dispensing justice. A great poet, Edmund Spenser, who had belonged to the English administration and who had lived in Ireland for a number of years, had, in the vicinity of 1592, paid solemn tribute to the character of the *brehons* and praised the justice of their decisions. But soon the jurists of the conquering power took the offensive, and thus during the first years of the seventeenth century, Sir John Davies, Attorney-General for Ireland, denounced the Celtic juridical theories as tending towards the destruction of the public weal.

IV. THE THREE PHASES OF LAW

In the development of law there is to be found in almost all civilizations, a first phase, to wit, that of esotery, or the phase where the doctrine is generally kept secret, and confided solely to the initiated. In the second phase juridical rules are recognized and made public. In the third phase they are systematically expounded, and made the subject of commentary.

Moreover, juridical rules are not necessarily the subject of codification. They may be in the form of custom, which does not by any means signify that they are kept sealed. To give an example of one of the most interesting European civilizations — that of Iceland — let us state that before the diffusion of the written word, precedents and customs were confided to the memory of the Skalds, the singers and poets. During the pagan epoch of the Icelanders they played an important part in matters involving successions. When Christianity was introduced, the clergy, having a more or less extended knowledge of letters, dispensed with the services which up to that time had been rendered by the Skalds, and introduced the art of writing. In Iceland, as well as elsewhere, in Norway, in the Althing, at the assembly of delegates from all the freemen, laws were not only made but preserved. As a matter of fact, each year the announcer of laws, the Laghman, came to recite the laws. He was elected by the people; in case discussion arose it was his duty to state what the law was with regard to a particular case. The abrogation of laws was easily accomplished: if during three consecutive years the law had not been announced and if no protest was made, it was considered abolished. Not only were juridical rules preserved by means of oral tradition in this northern civilization; the sagas too were thus handed down from mouth to mouth.

Often in the history of law, collections of laws have been designated as “codes.” The Roman codex was literally a collection of tablets, each of which had served its turn for inscription. We have stated in a former work how official collections were made at different periods. It may be added that the term “code” was given to these compilations whether they were cut in rock or engraved on metal.

In December, 1901, there was discovered at Susa the stone block on which Hammurabi, the Babylonian king, caused to be inscribed the provisions of public and private law, about the year 2000 before the Christian era. It is not known whether this monarch caused a number of transcriptions to be made, one of which may have been placed at Susa, the capital of the conquered province, or whether the block was transported as booty from Babylon in Elam, or, to use another name, Susiana.

In ancient India, the right of dealing out justice belonged to the entire tribe, which, generally speaking, exercised it through its "elders;" later, the chief of the tribe dispensed civil and penal justice, but his judicial authority soon passed to a great extent to persons learned in the law. At a later date, the Hindoo king is represented as taking part in the judicial hearings; competent men assisted him and acted as judges. The king condemns, precedents are invoked, and the strictest of all rules is that the law as it has been handed down shall not be changed.

There is a poem which expresses the first primitive notions of the origin of royal power, of order, and of law:

According to these ideas, royalty, through a divine ordinance, is the result of an after-thought on the part of the gods; men lived originally in an anarchic manner; at first there was neither king nor kingdom, nor punishment, nor one to inflict it; but when man's sense of justice was destroyed, then they laid hands on the property of others; this begot desire; desire passion; passion provoked a loss of all knowledge of duty; then perished the sense of right; the gods became frightened, they created law and order, till finally one man righting the uneven earth, brought the world into a state of order, blessed them by his protecting and directing power, and was thereupon, on account of his kindness, made king.

Juridical, moral, and religious ideas are mingled and interlaced with the juridical system of the Hindoos. At first their aim was a simple and practical one: to render each man secure with regard to what belonged to him, and to prevent rapine. According to one poem, the absence of law would be disastrous in its consequences: "Women could be stolen; people would devour each other like fishes. This was," it is added, "the state of the world before Mance was made

king; previous to his arrival people had tried to make laws for themselves; the laws were: 'a boaster, a bully, an adulterer, a thief must be banished;' but no one enforced these rules, and the people were miserable and asked for a king."

At a more advanced period the words of Leist, in his "Alt-arisches Jus gentium," are applicable, to wit, that the ancient Ayran law is founded on the belief in gods who protect *das Recht* and punish *das Unrecht*.

Rudolph von Jhering states that he has searched this epoch in the history of India in vain for an expression of the exact equivalent of *law*, or even the rudiments of the separation brought about from the very beginning in the Roman law between divine and human law, or between law and religion. This means to the jurist that the exact nature of law had not yet been recognized. During the historic epoch, the law of ancient India was essentially based on custom; to tell the truth, there were few, if any royal ordinances; kings recognized the limits of their power in tribal and local rules and in institutions. Moreover, it must be pointed out that the force of the Hindoo law was, above all, in itself, automatic, and the scope of such a sanction becomes apparent if one considers that marriage by abduction and by fraud was abandoned, not because of penalties or condemnations, but simply because the idea was introduced that, of the various modes of marriage — and there were as many as eight — the best and most dignified was the marriage in which the father gave his daughter away; inferior methods met with disfavor, and ended in comparative if not in total disuse.

The Hindoo customs have been compiled. As many as eighteen compilers have been mentioned who have been honored with the title of "legislators," and there were besides numerous commentators. One of the principal compilations is the *Book of Laws of Manou*; it is itself an off-shoot of an ancient compilation drawn up by the Vedic school, probably made towards the commencement of the sixth century before our era. At the beginning of the work, Manou, the father of mankind, is seen expressing his willingness to set out in detail to the *rishis*, in accordance with their request, the law of the

four castes. After having outlined a sort of cosmography in the first verses, he allows the sage Brigou, who has learned from his lips the book which Brahma has revealed to him, to continue in his stead. The compilation is a recognition of the power of the priesthood. It relates the punishment of the impious kings, and advocates respect to the clergy on the part of all. This code, like all Hindoo compilations, is far more comprehensive than modern legislative collections. As we have already said, moral precept is intermingled with juridical rule; it contains, even, maxims of etiquette and hygiene.

Elisée Reclus has set out, in his admirable style, the historic part played by Asia Minor. He says:

It is there that, inspired by Hellenic genius, this marvelous elaboration of all the elements of art, of science, of civilization, coming from Chaldea, from Assyria and Persia, from the Semetic world, and even indirectly from Egypt was put into play; they set all these foreign materials at work, and it is through them that this new acquisition was transmitted to their brothers by race in the islands of the Archipelago and on the continental coasts of Greece * * *. The Ionian civilization was the springtime of Greek civilization; the form it was which gave us the "primeurs" * * *. Asia is the land of Homer, of Thalys, of Heraclytus, of Pythagorus, and of Herodotus. Only, while in European Greece the light of genius seems to have been concentrated in Athens, it shone brightly amidst the numerous homes on the coasts of Asia Minor, Pergamo, Smyrna, Ephesus, Miletus, and Halicarnassus.

In these Hellenic centers of Asia, as in the states of Greece, juridical rules were drawn up and published; inscribed upon tablets of marble and brass, their precepts were open to the information of all. According to the statement of Sir Henry Sumner Maine, this phenomenon is observable at about the same period in the development of each community.

Is it necessary to call attention to the juridical history of Rome? We shall refer only to what is known as the Law of the Twelve Tables. As the eminent French scholar, Edouard Lambert, has said, it is generally admitted "that it marked the era of a formation founded purely on the custom of the Roman law, and that the majority of its provisions only served to perpetuate in writing rules which had already been accepted in practice without any intervention of the legislator."

The historical examples which we have just compiled and placed before the reader, examples which it would be easy to multiply, allow one conclusion to be drawn. It was not in a clear, precise, determined, and, if the word may be used, permanent form in which juridical rules first made their appearance. Law is not the creature of legislators; law even antecedes custom. The whole history of private law in its first period of development proves this to a demonstration, and the same is the case regarding public law and the law of nations.

V. THE CONCEPTION OF A SANCTION

Philosophers and theologians have seen fit to evolve theories even with regard to principles of law. Thus, the theological school asserts that the knowledge communicated to men by God is based on legal principle, while the partisans of secularization who were desirous of eliminating the religious element from all juridical rules opposed this view. Even at the commencement of the seventeenth century William Ockam, Marsile de Padoue, Jean de Jandun, took this stand in the struggle between the Emperor and the Pope. According to Grotius, the source of law is constant and permanent; it is the tendency to social intercourse inborn in mankind — judgment based on reason, which is the innate characteristic of the human mind. Emmanuel Kant enunciated the doctrine that the end and purpose of the law is liberty. He took the view that every act which makes it possible for every man in the exercise of his natural freedom of action to place himself in accord with the freedom of action of all men is in conformity with the law, that is to say, is just; but every act which can not be reconciled with general liberty of action is a blow aimed against the law, and is unjust. He adds, "It is true that the idea of law includes the power to restrain. The latter," he says, "is a necessary result of law; as long as the system based on freedom of action is in conformity with the universal freedom of all it follows that it must be just, and that everything which opposes that common liberty is for the same reason unjust, and resistance opposed to this obstacle is in accordance with the principles of common liberty and is just."

The theory of John Austin deserves comment in connection with those hitherto enunciated. In his opinion the substance of jurisprudence is positive law, in other words, law established by political superiors for political inferiors, and its essential characteristics are, as we have seen, the authority to command, which in turn is the expression of a desire, and, in addition to that, a sanction, that is to say, the disagreeable consequences which will probably be met if the command is disobeyed.

The conception of a sanction as indispensable to the conception of law is worthy of examination. In order for juridical regulations to exist a penalty to be imposed upon the offender must also be provided. In the absence of the existence of such a penalty can it be said that there is no such thing as juridical regulation? The reply must be in the negative. As we have already had cause to remark, law exists not only in the absence of sanction, but even when it is crushed under foot. In every-day life and elsewhere the intervention of sanction is the exception and not the rule. Every moment thousands and thousands of juridical acts go on in the life of the individual without his considering whether or not failure on his part to carry out his obligations will result in punishment. Certain juridical institutions have long existed without the power of enforcement. Such is the case of barter and exchange, or, in other words, the delivery of one thing for its equivalent. As a commutative contract barter has its place amongst savages, wild tribes and civilized peoples. Moreover, it happens frequently in civilized communities that jurists differ amongst themselves with regard to the means which should be employed for its judicial enforcement.

We have already stated that sanction in the sense of coercive force is often lacking in constitutional law. In the majority of countries there is no institution charged with enforcing the terms of the fundamental pact, and it thus happens that laws in conflict with the constitution must be applied by the courts. James Bryce made the following observation:

The Crown is now in England bound by statute to summon parliament, but should the Crown omit to do so, parliament could not legally

meet of itself, save that upon the demise of the Crown, it does forthwith come together to swear allegiance to the new sovereign.

Sanction has on occasion been forestalled. Thus it was that in France the Constitution of the year VIII made the *senat conservateur* guardian of the Constitution and imposed upon it the duty of sustaining or annulling all acts which should be submitted to it on the question of constitutionality, by the tribunate or by the government, and to pass upon the constitutionality of the decrees of the legislative body. In the United States of America in the court of last resort, the judicial power passes upon the constitutionality of laws enacted by the several States or by the general government, whenever they may bring up judicial questions. The same is true with regard to the constitutional law of the federal republics of America, such as the United States of Mexico or of Brazil, and other countries.

VI. CUSTOM IN THE THREE FIELDS OF LAW

In the field of private law the law continues, even at this day, to be expressed in the form of custom as well as in that of law. There are still many nations with whom custom is a juridical source more fertile even than the law, that is, nations who up to the present time have not turned, or are turning but slowly to the written law. To a great extent law appears in the guise of custom in the constitutional field of powerful nations. That is the case in England. Their constitution is for the most part unwritten. It may be interesting to note that Oliver Cromwell drew up the *Instrument of Government*, the first modern constitution reduced to writing. Among political writers the idea of the written constitution found strong adherents in the eighteenth century. When the English colonies in America proclaimed their independence, some of them drew up constitutions. They did so at the request of the Philadelphia Congress issued on May 15, 1776, in its capacity as the representative of the colonies which had determined to bring about a separation from the mother-country. Hence, between 1776 and 1780, the constitutions of Virginia and five other States. In the domain of international law the generative force of custom continued to develop, although the con-

tractual tendency manifested by treaties, and above all, by general treaties, in other words, the public expression of the collective will, has often taken its place in more modern times.

In the middle ages, jurists made a distinction between *usus* and *consuetudo*. "*Usus sonat factum*," says Lopez in his annotations of the *Siete Partidas*, "*consuetudo id est quod oritur ex dictis et factis, quæ homines populi dicunt et faciunt, sequuntur que continuatim, longi temporis spatio, metu vel coactione aliqua non interveniente*." But different ideas have been entertained regarding the value of custom. Some writers hold that custom is as authoritative a source as the law itself, while others are of the opinion that it should be relegated to a lower rank. According to the latter, true juridical rules consist of actual written formulas. Only when law is actually drawn up and promulgated as such does it amount to an authoritative expression; and even custom, in order to contain the force of juridical rules, must fulfil certain conditions which make it apparent that it is the result of forethought, the subject of general acceptance, and in conformity with reason. In canonical law these conditions have been expressed as such ever since the twelfth century; at the end of that century glossarists, and later commentators adopted the opinion of the canonists on this point.

The Church had found itself obliged to recognize the legitimacy of custom. It was scarcely in a position to legislate; or, perhaps, it would be better to say that the exercise of the power of legislation had become extremely difficult as far as it was concerned. The fathers of the Church recognized that a number of rules could be justified only on the ground of custom — such as making the sign of the cross, offering up certain prayers, and facing toward the East. But when the Church became autonomous and in a position to exercise legislative power, it itself, or rather the canonists, assumed an attitude hostile to custom; they insisted that custom should be of long duration, that it should be based on reason, that it should be in conformity with rules formally promulgated by an authoritative source, and that the tacit consent of the authorities should have been obtained. One question in particular was agitated, to wit, that of

determining whether custom ought not to be recognized as such by a judgment rendered on debate. The question was decided in diverse ways, although the majority of the writers on the subject asserted the uselessness of judicial recognition.

We have just seen that in the field of public law custom has preserved its importance in a number of countries. As far as relates to the law of nations, and from the very beginning thereof, are to be found indications analogous to those which we have met in discussing private law. It was the conception of the risk of punishment falling upon the transgressor which at first constituted the safeguard of heralds and ambassadors. The *Book of Laws of Manou* contains the following maxim: "He who strikes an ambassador rushes on to his own loss and destruction." Even in the heroic era Greece recognized the sacred character of hostile heralds. At Rome the greatest respect was shown to ambassadors; according to Denys of Hali-carnassus, they were regarded with the same veneration which was accorded to the priesthood. A maxim of the Koran states that an envoy should receive nothing but good and open treatment. The celebrated canonical compilation of the twelfth century, the *Decree of Gratian*, protects ambassadors under the threat of excommunication. When the jurists of the Middle Ages began to study questions concerning the intercourse of nations and their dealings with one another they were unanimous in reaching the conclusion that ambassadors had the right to the safety of the road — "*securitas viæ*." The text called attention to the fact that should any person throw obstacles in the path of the mission of the envoy, either of a friendly or of a hostile power, he would be subject to excommunication under the canonical law, whereas under the civil law he would be delivered to the enemy to be sold into slavery. It said that an injury done to an ambassador was an injury done to the prince who sent him. Alphonse X, following the Roman law, formally declared in the *Siete Partidas* that every ambassador coming to Castile, whether Christian or Mahommedan, was to come in safety; that no one might do him harm either in person or property. In one text of the canonical law selected from a compilation made by Saint-Isidore de Seville,

who himself had borrowed from Ulpian, mention was made of the religious obligation not to do violence to envoys, and that this obligation constituted a part of the law of nations: "*Jus gentium est legatorum non violandorum religio.*" Citing, with some slight modification, the words of the Roman lawyer Pomponius, Angelus de Ubaldis maintained that ambassadors were held to be sacred — "*legati dicuntur sancti.*" So insistently did the authorities attribute the religious character to ambassadors, that those who offered them injury were held guilty of sacrilege: "*Legati appellantur sancti, infredientes eis injurias incidunt sacrilegio.*" Thus did inviolability, one of the two great prerogatives of public ministers, become affirmed; and this, according to one writer, means the most absolute and complete exemption, the right to the most vigilant and effective protection. At the commencement of the seventeenth century, Jean Hotman, the author of the treatise *The Duty and the Dignity of Ambassadors*, said:

With regard to his person, it is common knowledge that by law both human and divine, even amongst barbarous nations and in the midst of arms and enemies in arms, the person of the ambassador has been at all times held sacred and inviolable. The penalty inflicted upon those who injure them has been at all times most severe. This law has come to be proverbial, namely, that an ambassador is always exempt from any outrage and any harm. * * * And when men have not inflicted punishment it has been seen from century to century that God has not allowed this crime to go unpunished; and in witness hereof, observe the destruction of Carthage, of Tyre, of Thebes, of Corinth, and of so many other states, and even entire provinces and kingdoms.

The sea has played a prominent part in the history of humanity. Three-fourths of the area of the globe are covered by its waves. Not only does the ocean exercise a beneficent influence on the general economy of the planet, but as a field of action it guarantees to enterprising nations supremacy and preponderant influence. It would be possible to write a history of the sea, or rather of that which has occurred upon the sea, and to call particular attention to the juridical institutions which have to do particularly with matters oceanic. Maritime law includes in its broadest conception all relations which arise by virtue of the sea. It constitutes a branch of general com-

mercial law, and at the same time is based upon the law of nations. While many of the institutions of maritime law are relatively recent, some, on the contrary, are of great age; and almost all are peculiar in that they constitute in effect the application to naval transactions of rules originating or put into practice on land. They are in a sense a continuation of "terrestrial" institutions. This is admitted in private maritime law. Uniformity, which is a characteristic of this law, owes this feature to its field of action, to wit, the ocean, which is everywhere the same. A French jurist, Fremery, has said that those who navigate the sea constitute an individual people just as do those who deal in trade and barter upon the land. Says he: "They occupy this vast heritage in common, and they glean in freedom its fertile yield." He calls them "a nation" which gathers within its bosom classes drawn from all the people of the world.

By virtue of its origin maritime law is based on custom. The great international conventions dealing with this law are of recent date. For centuries there was no law-giver, and when legislative acts came into existence they were simply declaratory of customs regularly observed. Some of these provisions have a curious origin. James Lorimer cites the custom of the desert in connection with this subject. From time immemorial groups of merchants have crossed deserts. Usages grew up regarding the respective rights and duties of those who formed a portion of these caravans, and amongst these usages is to be found the custom of determining the liability of those whose effects have been preserved in order to indemnify those whose goods had been sacrificed by way of jettison. A like rule is to be found with regard to mercantile operations by sea. "The *lex Rhodia de jactu*," says the author we have just mentioned, "which the Romans borrowed from the Phœnicians, is now in general observance amongst the tribes of the Sahara, as the customary mode of distributing the losses incurred by caravans crossing the desert, between the company owning the camels, or what in railway language would be called the plant, and the passengers or owners of goods. The *Khodja* or scribe acts as a supercargo and is said to be quite conversant with the distinctions between general and special average." The Sahara —

that is the Desert in a pre-eminent sense has been described, in 1895, by A. H. Keane. The strictly desert zone is 2,386,000 square miles, with a sporadic population of 1,400,000. Says Keane:

In the whole of the Sahara proper there is not a single carriage road, not a mile of navigable water, not a wheeled vehicle, canoe or boat of any kind. There are scarcely even any beaten tracks, for most of the routes though followed for ages without divergence to right or left, are temporarily effaced with every sandstorm, and recovered only by means of the permanent landmarks — wells, prominent dunes, a solitary eminence crowned with a solitary bust, or else a line of bleached human and animal bones, the remains of travelers, slaves, or camels that may have perished of thirst or exhaustion between the stations. Few venture to travel alone, or even in small parties which could offer little resistance to the bands of marauders hovering about all the main lines of traffic. Hence the caravans usually comprise hundreds or even thousands of men or animals all under a *Kebir* or guide, whose word is law, like that of the skipper at sea. Under him are assistants, armed escorts and scouts, to spy out the land in dangerous neighbourhoods, besides notaries to record contracts and agreements, sometimes even public criers and an *imân*, to recite the prescribed prayers to the faithful.

The French writer, Raymond Thomassy, holding that both in the case of caravans and merchant ships, journeys are made in but one bottom, "*sillage*," whether across the desert or across the sea, says that in either case, the conditions arising from isolation or protection from hostile attack are identical. As a matter of fact the organization of the land journeys of the caravans was like that of the sea-voyage of the merchant ship before the great changes brought about in ocean traffic at the time of the crusades. During the period of antiquity and the first half of the Middle Ages, traders embarked with their wares and sailed from port to port in the company of the owner of the vessel. Operations by caravan were carried on along analogous lines.

Regarding the development of juridical institutions of the sea through custom, a striking example is afforded by the case of the Mediterranean. Carl Ritter, the famous geographer, designates the following as the triple period of civilization: the three epochs of fluvial, Mediterranean and oceanic civilization. The Mediterranean era lasted for nearly twenty-three centuries. Beginning about the

year 800 before our era, when the Phœnicians, already long established on the eastern coast of the Mediterranean, succeeded in founding their factories on the shores and in the islands of the great interior sea. The era came to an end when at the end of the fifteenth century the geographical discoveries of that period changed the center of activity, and inaugurated the beginning of the Oceanic epoch. In the last centuries of the Middle Ages, that beautiful and progressive civilization at the head of which were the Italian states, Norman Sicily, the states of the French Mediterranean, and Spanish towns such as Barcelona, declined. In the principle ports maritime law appeared in the form of juridical rules which arose from marine and commercial usages, solidifying first through force of oral tradition, then taking on the form of digests of judicial decisions, or even regulations, stating generally that their text was no more than a simple codification of rules which existed already in fact.

In the formation of these juridical rules of the sea the maritime guilds of the different cities played an important part. The guild of maritime commerce was an association of all those interested in commercial maritime dealings. In various cities the guild takes the name of *ordo maris*, in others that of *curia maritima*, in documents drawn up in Latin. Men became members of the *ordo* or of the *curia maritima*; the members entered under oath; and magistrates were appointed by the guild, who were known by the historical name of consuls. They watched over the security of property on the sea; and insisted that the commanders of armed vessels pledge themselves under oath to do no injury to friends of the city, and give a guaranty against the commission of transgressions. If an injury were committed against friends the consul took up the question of punishing the offenders. Consular decisions were soon compiled, and those works, known as the *Book of the Consulates*, appeared; in other words collections of the judgments rendered by the Consular Tribunals. The Consulates appear to have been Italian in origin. It seems that in the controversy between Pisa and Barcelona with regard to the precedence of their guild and consular court, a decision in favor of Pisa was rendered. However that may be, the real document par

excellence of the middle ages was the *Consolat del Mar* of Barcelona. In the thirteenth century, the Catalogue had shown considerable commercial development in almost all the ports of the Mediterranean. At this time, Montpellier in the French Mediterranean was under the scepter of the House of Aragon. It was a great commercial city but exceeded in importance by Barcelona. During the long reign of Jayme, the first king of Aragon, Barcelona had received important privileges; she had obtained on behalf of her citizens the management of the municipal interests. Maritime differences were necessarily destined to invite the attention of competent men, or *probi homines*, as was said, who gave judgment. These judgments were preserved by means of oral records. Finally they were committed to writing, and when printing had been introduced in Spain, one of the first works struck off was the *Consolat del Mar*.

Amongst the ancient collections of decisions and regulations, the *tabula amalfitana*, which originated in the maritime court of Amalfi, plays a prominent part, as does the *ordinamenta et consuetudo maris*, a compilation of the decisions of the consuls and of the body corporate of the seamen of Tranci, which, it is said, dates back to the year 1063. There is also the *capitulare nauticum*, a revision made at Venice of a still older compilation; and the *constitutum usus*, and the *breve curiæ maris* of Pisa. As a matter of fact their origin was always in custom. If public authority intervened it was simply for the purpose of showing that judicial decisions or customs were such or such. Two compilations were finally recognized as authoritative: the *Consolat del Mar* of Barcelona, which contained the jurisprudence of the *probi homines* sitting in the maritime court of Barcelona, and the so-called *Ley Oleyroun*, or the rules of the island of Oleron. The *Consolat* was recognized over the greater part of the Mediterranean. The Rules of Oleron were observed to a certain extent on the Mediterranean but their effect was above all felt on the Atlantic, and over the northern seas, where three distinct juridical bodies of law came into being: the law of Oleron, as such, the Flemish maritime law, and the Law of Wisby. The *Consolat del Mar* had above all for its purpose the settlement of private disputes arising in con-

nection with commerce and navigation. It deals chiefly with rules applicable in time of war, to vessels and cargoes of enemy subjects, and to vessels and cargoes of "friendly subjects," as it says — neutral subjects, as we would say to-day. The provisions applicable to these special conditions were for many years accepted as rules of naval warfare. Some maritime Powers denied their force, while others steadily recognized them; and thus simple rules originating in the sentences of the *probi homines* of a southern city constituted for centuries the law of nations who were struggling for mastery of the sea.

It would be easy to furnish an abundance of proof and an abundance of cases, but let us limit ourselves to a statement of the propositions which no student of the history of law will deny: custom is invariably at the bottom of maritime institutions and rules. This is true both as regards private law and the maritime law of nations, both in time of peace and in time of war.

ERNEST NYS.

[TO BE CONTINUED.]